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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1406

CHARLES ALLAN BROOM,

Petitioner

v.

STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

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Petitioner CHARLES ALLAN BROOM, under authority of Rule 24, paragraphs 4 and 5, submits this reply to arguments first raised in Respondent's Brief in Opposition and to call attention to a decision of this Court rendered since Petition was filed.

NEW ARGUMENTS

Through her Attorney General the State of Texas has abandoned primary fact findings and legal conclusions in the opinion of The Court of Criminal Appeals of Texas (now reported at 463 S.W. 2d 220; Appendix A, Petition for Writ of

Certiorari). Recasting the principal question presented by Petitioner, Respondent undertakes to develop a theory – one not embraced in that opinion – to sustain the judgment below. Now acknowledging, as opinion of the Court of Criminal Appeals did not, that Sergeant Spain began his venture upon an unverified report *from an anonymous caller*[1] whose reliability and credibility were unknown, Respondent argues that seizure and search of Petitioner should be upheld under authority of *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329 (1959) – candidly recognizing, however, that the informer in *Draper*, a "special employee" of the Bureau of Narcotics, had proven the reliability of his information in the past, Brief, pp. 4-5.

In attempting to stretch *Draper* to fit this case, Respondent asserts that here "subsequent police investigation disclosed the reliability of the information received," Brief, p. 4. But to bolster its new theory, Respondent paints over true factual details with broad strokes of three deceptive conclusions stated in Brief, p. 4. Close reading of the record demonstrates how actual facts are hidden by those specious conclusions.

(1) Sergeant Spain was told the anonymous caller had claimed "there were three hippie-type individuals" in the park; neither the sex nor other description of the three "hippie-types" was stated. Yet, converting that ambiguous report into information that "three hippie-type persons, *two boys and a girl,*" Respondent would have it that officers found "*the* three hippie-types" when they came across Petitioner and his companions. Among other considerations, no account is taken of the span of time from the initial anonymous report to the confrontations.

(2) After Spain rendezvoused with Sergeants Llewellyn and Phillips, he separated from them and drove alone north on Lamar Boulevard. In the park he observed three persons he deemed "hippie-types:" a boy and a girl sitting on the grass and a boy "dancing" – "He had his arms extended sideways and

[1] All emphasis is supplied throughout by the writer of this reply unless otherwise indicated.

was turning around and moving from side-to-side." A small dog was with them. Petitioner was thus cavorting in a public park in the middle of an afternoon of "the first beautiful day . . . in about two weeks" on the occasion of a small picnic with friends while around them Spain also observed other males running and jogging in sweatshirts and gym shorts and couples walking along the hike and bike trail. Spain did not see Petitioner or his companion smoking anything. While Spain was neither asked for nor expressed any opinion about his observations, Respondent translates them into "an indication that he (Petitioner) was under the influence of marijuana," Brief, p. 3, and conjectures that "Petitioner's actions were consistent with one under the influence of marijuana, leading to the rather definite belief that he had recently been smoking the drug," Brief, p. 4. Of course, observations by Spain are not observations by Llewellyn or Phillips,[2] the latter officer actually seizing and searching Petitioner outside the presence of Spain.

(3) Spain was not asked whether and did not claim that he recognized Petitioner from any prior occasion. Phillips, who accosted, seized and searched Petitioner, testified unequivocally:

"Q At the time you observed Broom and before you searched him, did you recognize him as any person you had known before?

A No, I didn't know him.

Q Did you recognize him in any way?

A No."

Llewellyn agreed to a leading question to the effect that he did recognize Petitioner "as being handled in your department before." But there is no showing that Llewellyn imparted his

[2] Both Phillips and Llewellyn conceded that from the time they first saw Petitioner and his companions walking toward them as they traversed the initial thirty to forty yards between them Petitioner and his companions were "just walking" and Petitioner "was not doing anything unusual."

hazy "recognition" to Phillips before Phillips searched Petitioner.[3] Moreover, whatever vague recognition flashed to Llewellyn that afternoon did not include almost two-year old details and his recollection of them was later refreshed by reviewing "the transcript of Mr. Broom's prior case last week or the day he was arrested." Thus, befor his confrontation with Phillips, Petitioner was *not,* as Respondent now contends, "known to have been arrested earlier for the sale and possession of LSD. . . ." Brief, p. 4, by either Phillips or Llewellyn.

So it is that actual facts of the matter belie conclusions now drawn by Respondent. They certainly do not show, as Respondent contends, that officers "verified . . . Petitioner had, *in fact* been smoking marijuana because of his observed actions and because of his previous connection with LSD," Brief, p. 4.

NEW DECISION

Whiteley v. Warden, No. 136, just decided March 29, 1971, while perhaps not controlling because there, unlike here, that a criminal offense had been committed was a certainty,[4] is instructive enough to warrant consideration in resolving the search issue here. Its teachings, we submit, reject contentions made by Respondent in this cause.

[3]Indeed, the record affirmatively demonstrates that even if Llewellyn did recognize Petitioner he did *not* inform Phillips:

"Q And as you and Sergeant Phillips, on foot, approached them on the hike and bike trail, neither you nor he said anything to one another about the people you were looking for or what they might be doing or that those were the people or anthing, did you?

A If I recall correctly, as we saw the three people walking toward us, we remarked to each other that these were probably the people we were looking for . . .

Q Who remarked to whom that these were probably the three people?

A It could have been me. It could have been Sergeant Phillips. I don't recall."

[4]Also, in *Draper,* unlike here, probable cause to believe that an offense was being committed originated from a report of a reliable and credible informer; here an anonymous caller provides no reasonable basis for believing even that an offense had been or was being committed.

When the Court applied those standards a court "would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant," the essence of its itemization of "information possessior" by the arresting officer is that a burglary had been committed and that the car and its occupants stopped by him matched or fitted the detailed description given in State Bulletin 881, requesting that persons named by "P and H." Then the Court concluded that "the very most the additional information tended to establish" was that the originator of the initial information knew the occupants and the kind of car they drove. In other words, the arresting officer's knowledge and observations merely confirmed descriptions specifically given in the bulletin. Here Phillips had no information of greater significance.[5]

CONCLUSION

Now that Respondent has restructured its position, the true facts in the record appear to make *Beck v. Ohio*, 379 U.S. 890, 85 S. Ct. 223 (1964) so dispositive of the search issue as to warrant summary grant of the writ and reversal of judgment of conviction.

On the other hand, since the theory adopted by Respondent and urged upon the Court has really never been ruled by The Court of Criminal Appeals of Texas in this cause, to grant the writ, vacate the judgment and remand for further consideration

[5] Even if knowledge of the innocent act of "dancing" is credited to Phillips no help is derived. Cf. *Garcia v. Nelson*, F. Supp. , 7 Cr. L. 2327 (N. D. Calif., 1970):

> "The jumping into the air and shuffling of Garcia, described as a 'little dance,' is not an act which can in any way be reasonably said to relate to criminal ctivity."

Garcia performed in a public bar; Petitioner in a public park.

in the light of that new theory and *Whiteley* seems to be an appropriate alternative approach.

Failing either, for reasons stated in original petition and upon contentions in this reply, Petition for Writ of Certiorari should be granted for hearing on merits and further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., attorney for Petitioner, certify that a copy of the above and foregoing Reply to Brief in Opposition has been served on Respondent by placing same in the United States mail, postage prepaid, to Respondent's attorney, Lonny F. Zwiener, Assistant Attorney General, Box 12548, Capitol Station, Austin, Texas 78711 this day of April, 1971.

Sam Houston Clinton, Jr.